IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3068 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALUBHAI DHULABHAI MAKWANA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3068 of 2001

MR DP KINARIWALA for Petitioner No. 1

Mr.Dave, AGP for Respondent No. 1

MR MM TIRMIZI for Respondent No. 2

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 30/09/2002

ORAL JUDGEMENT

Rule. Mr.Dave, Ld.AGP for respondent No.1 and

Mr.Tirmizi for respondent No.2 appear and waive service of rule on behalf of respective respondents. With the consent of parties matter is taken up for final hearing today.

2. The short facts of the case are that the respondent No.2 has filed a Lavad Suit No.1781/97 before the Registrar, Board of Nominees for recovery of Rs.13,30,569.70ps from the petitioner on the ground that the petitioner has misappropriated the said amount from the funds of the society and he is required to pay the same. In the said suit application for temporary injunction was submitted. The petitioner was served with the notice for temporary injunction and in response thereto the petitioner filed reply by way of objections and it is the case of the petitioner that in the reply the application for temporary injunction the petitioner had declared before the court that the plaint is not served upon him. The learned Nominee had initially granted exparte temporary injunction restraining the petitioner from transferring the property as mentioned in the order. Thereafter, there was bi-partitite order whereby the application for temporary injunction was allowed and the ad interim order was confirmed. The case of the petitioner is that thereafter since he was not served with the copy of the plaint no reply was filed by him or rather he could not file the reply and inspite of the same the learned Nominee proceeded exparte and passed the judgment and award dated 30.3.99 whereby the suit is decreed by directing the petitioner to pay the amount of Rs.13,30,569.70ps with interest at the rate of 12% p.a. from 16.5.97 and also to pay Rs.5,000/- towards costs of litigation.

3. The petitioner preferred Appeal No.476/99 before the Gujarat State Cooperative Tribunal, Ahmedabad and in the appeal also the contention was raised on behalf of the petitioner that since copy of the plaint was not served and the learned Nominee also did not verify the said aspect and therefore the exparte judgment and award of the learned Nominee should be quashed and set aside. The tribunal, ultimately, passed the judgment and award dated 12.3.01 in appeal whereby the appeal is dismissed and the said order is under challenge in this petition.

4. The Learned Counsel for the petitioner, Mr.Naik submitted that since the copy of the plaint was not served on the petitioner and since the petitioner had disclosed the said aspect in the reply to the interim application, it was obligatory on the part of the Ld.Nominee to verify the said aspect and then only to

proceed exparte. He submitted that since the plaint was not served the petitioner could not be said to be legally compelled to submit the written statement and therefore the matter has proceeded exparte without verification of the basic requirement that the copy of the plaint should have been served upon the defendant and he submitted that the tribunal instead of remanding the matter has proceeded on the basis that even if the matter is remanded no change would be made and therefore Mr.Naik has submitted that the order passed by the tribunal as well as by the Nominee deserve to be quashed and set aside.

5. On behalf of respondent-State Mr.Dave as well as Mr.Tirmizi on behalf of respondent No.2 have supported the order. Mr.Tirmizi submitted that in case the court finds that on account of procedural lapse the matter should not have proceeded exparte and then also it is a case of misappropriation and since the awarded amount is a huge amount with interest the court may put the petitioner to reasonable condition directing the petitioner to deposit not less than 25% of the awarded amount as a condition precedent for re-trial of the suit and also cost.

6. Considering the above and a perusal of the order passed by the tribunal shows that the tribunal has proceeded on the basis that it was the duty of the petitioner to apply to the Nominee by giving application to have the copy of the plaint and then to submit written statement. In my view, the tribunal could not have overlooked the mandatory requirement that it is the plaintiff who has to establish that the proper procedure is followed after that only the suit can be proceeded exparte. It is true that the tribunal has recorded the observations that the summons were duly served, but the said observations are on the basis that since the reply was filed to the application for injunction on behalf of the petitioner the summons are served. In my view the proceedings of interim application are different and the proceedings of suit are different. It may run, sometimes, simultaneously, but that does not mean that it is not required for the plaintiff to serve the summons and copy of plaint on the defendant. The tribunal has not recorded any finding as to whether the plaint was duly served upon the defendant or not. Further, the tribunal has also proceeded on the basis that even if the matter is remanded no change would be there in the result and therefore the tribunal has dismissed the appeal. In my view, the said approach of the tribunal can be said to be erroneous because in trial of the suit when admittedly

the suit has proceeded exparte, the evidence submitted on behalf of the plaintiff can not be read as an absolute evidence, more particularly, when an opportunity was not given and witnesses are not permitted to be cross examined. The tribunal, at the most, could have examined also whether the Nominee was justified in proceeding exparte or not. It was not proper on the part of the tribunal to observe that no change would be there even if the matter is remanded.

7. However, certain observations which have weighed with the tribunal are that the suit was for recovery of amount which was misappropriated by the petitioner and that too it was also huge amount of Rs.13 lacs and more. It may be that the petitioner may have genuine defence for the same to certain extent, but since the Nominee has found that upon the documentary produced on record the claim of RS.13 lacs and more is established and the same can not be totally ignored for the purpose of exercising judicial discretion even while remanding the matter for deciding afresh. At the most, the petitioner-defendant would be entitled to have set-off or the adjustment, if ultimately the award is passed against him, and if the suit is dismissed, then, at the most, defendant would be entitled to refund. If any unconditional direction or order of remand is passed, in my view, it may encourage the tendency of litigant to allow the suit to be proceeded exparte and then to complain to higher forum by ignoring the principles of natural justice.In the present case, it may be that the plaint was not served on the defendant, but at the same time, it can not be ignored that the defendant was aware of the proceedings of the suit and he could have taken steps for getting copy of the plaint though it may be the legal duty of the plaintiff to supply. In these peculiar facts and circumstances of the case, I am of the view that judicial discretion demands that even if the matter is to be remanded for giving opportunity of hearing to the petitioner for defending the suit, the defendant should not get premium on account of his own fault and he should be put to reasonable terms which may also protect the interest of the society. I am also inclined to take said view more particularly when the suit was on the ground of alleged misappropriation of the funds of the society and the petitioner was the Secretary of the Society.

8. Considering the above, I am of the view that the following directions would meet with the ends of justice:

(i) The petitioner shall deposit 25% of the awarded amount with the respondent No.2-society within a

period of four months from today, subject to final outcome of the suit.

(ii) After the said amount is deposited with the respondent No.2-society and after the receipt thereof is produced, the petitioner would make application to the Nominee for retrial of the suit afresh.

(iii) The learned Nominee after giving opportunity to the society as well as to the petitioner shall re-try the suit without being influenced, in any manner, by the observations made in the exparte judgment and award as well as by the observations made by the tribunal and render decision within six months from the date on which such application is made by the petitioner. While passing final order in the suit after retrial, the learned Nominee shall pass consequential orders as regards 25% of amount deposited by the petitioner as referred to hereinabove.

9. If the petitioner fails to deposit the amount as indicated earlier, within four months from today, the learned Nominee will not be required to retry the suit and society shall be at liberty to recover the awarded amount as per exparte judgment fully from the petitioner in accordance with law.

10. In addition to the above, the petitioner shall pay the costs of Rs.10,000/- to the respondent No.2society towards litigation before the tribunal as well as before this court and such amount of costs shall be paid within two months from today.

11. The petition is allowed in terms of above directions only and rule is made absolute accordingly.

30.9.02 (JAYANT PATEL,J)